United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-2191

Original

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-2191

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, ESTHER SKIPPER, Individually and on Behalf of All Similarly Situated Non-Supervisory Female Employees of American Telephone and Telegraph Company, Long Lines Department,

Appellants,

versus

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG LINES DEPARTMENT,

Appellees.

Appeal from the United States District Court for the Southern District of New York

MOTION OF AND BRIEF OF ALASKA AIRLINES, INC., ALOHA AIRLINES, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., FLYING TIGER LINES, INC., FRONTIER AIRLINES, INC., HAWAIIAN AIRLINES, INC., HUGHES AIRWEST, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., NORTHWEST AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, INC., SOUTHERN AIRWAYS, INC., TEXAS INTERNATIONAL AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., WESTERN AIRLINES, INC., WIEN ALASKA AIRLINES, INC., AS AMICI CURIAE

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AIRWEST, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., NORTHWEST AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, INC., SOUTHERN AIRWAYS, INC., TEXAS INTERNATIONAL AIRLINES, INC., TRANS WORLD AIRLINES, INC., WIEN ALASKA AIRLINES, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

COMES NOW Alaska Airlines, Inc., Aloha Airlines, Inc., Allegheny Airlines, Inc., American Airlines, Inc., Braniff Airways, Incorporated, Continental Air Lines, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., Flying Tiger Lines, Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Hughes Airwest, National Airlines, Inc., North Central Airlines, Inc., Northwest Airlines, Inc., Ozark Airlines, Inc., Pan American World Airways, Inc., Piedmont Airlines, Inc., Southern Airways, Inc., Texas International Airlines, Inc., Trans World Airlines, Inc., United Air Lines, Inc., Western Airlines, Inc., Wien Alaska Airlines, Inc., hereinafter called "Amici Airlines," and pursuant to Rule 29, Federal Rules of Appellate Procedure, hereby respectfully move the Court for leave to file the attached Amici Curiae Brief on behalf of Appellee, American Telephone & Telegraph Company, Long Lines Department. Both appellee and appellants have consented to the filing of this brief.

APPLICANTS' INTEREST

1. Applicants are major domestic and international U.S. airlines employing over 100,000 women in the airline industry throughout their route systems. Their employment benefit plans and costs of doing business will be dramatically affected if there is an adverse result in this case.

2. Various amici airlines have been parties defendant in litigation in lower federal courts throughout the country in cases which have raised new and important questions concerning the merits of the exclusion of pregnancy coverage from employer benefit plans; see, for example, *Newmon v. Delta Air Lines*, 375 F. Supp. 238 (N.D. Ga. 1973), involving, inter alia, the issue presently before this court.

3. Because these airlines employ large numbers of women of child bearing age, the decision in this case could have a major impact on the future economic health of these companies, a number of which have already suffered net losses of millions of dollars in recent years. It is in the public interest that they be allowed to present their views to this Court.

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FACTS

I. Women Receive A Disproportionately Higher Amount Of Benefits Under Existing Disability Plans.

The present distribution of benefits between men and women under appellee's sickness and accident disability plans demonstrate that women are already the preferred class of recipients, even without considering absences relating to normal pregnancy. Exhibits R-1, R-2 and R-3 to the Supplemental Answers to Plaintiff's Interrogatories reflect that in fiscal years 1970-1971 and 1971-1972 female employees of Long Lines had a higher frequency of disabilities and lost more total days from work in thirteen of the seventeen disability group classifications. In fiscal year 1970-1971 women accounted for 56.4% of the total days for which benefits were paid even though they were approximately 35% of the total work force eligible for such benefits. Similarly, in fiscal year 1971-1972 the Answers to the Interrogatories show that women received compensation for 54.5% of the total benefit days, although they represented only 33.5% of employees eligible for such benefits.

The experience of the General Electric Company confirms appellee's statistics. Actuarial data stipulated to the Court in *Gilbert v. General Electric Co.*, 7 FEP Cases 796 (E.D. Va. 1974) showed that GE's experience, by sex, with respect to claims under its weekly sickness and accident disability insurance coverage was as follows:

1970	Male	Female
No. of claims (new)	19,045	15,509
Average duration of claim	48 Days	52 Days
No. of new claims per thousand employees	77	173
Average No. of employees covered	246,492	89,705
Total Benefits Paid	$11,279,110	$7,405,790
Average Cost Per Insured Employee of Benefits Paid	**$45.76**	**$82.57**

1971	Male	Female
No. of claims (new)	22,897	17,719
Average duration of claim		
No. of new claims per thousand employees	99	217
Average No. of employees covered	231,026	81,489
Total Benefits Paid	$14,343,000	$9,191,195
Average Cost Per Insured Employee of Total Benefits Paid	**$62.08**	**$112.91**

Similarly, under the California Unemployment Insurance program challenged in *Geduldig*, the trial court

noted that "Women contribute only 28% of withholdings but draw 38% of the benefit payments. Put another way, men receive $.89 per dollar contributed, while women receive $1.37 per dollar contributed." *Aiello v. Hansen*, 359 F. Supp. at 802 n.1.

II. Over One-third Of The Women Who Take A Maternity Leave Of Absence *Do Not Return To Work* After The Baby Is Born.

The following system statistics complied by Long Lines in the Answers to Plaintiff's Second Interrogatories show that of the total number of women who indicate a desire to return to work and therefore take maternity leave of absence (not to be confused with the number of female employees who decide before the birth of their child not to return to work and simply resign employment at some time during their pregnancy)[1] *over 37 percent do not return to work* after the birth of the child:

(1) For New York Telephone Company, for a period from October 1, 1972 to January 31, 1973, of 612 maternity leaves granted (i.e., indicated a desire *to* return to work) 225 women were not reemployed due to a personal choice not to return to work *(37% did not come back)*

For the same company, for a period from July 1, 1971 to

1 Obviously, if a pregnant employee who was no longer working were entitled to receive sickness and accident disability benefits for the period up to and beyond the birth of the child as a matter or right, she would have absolutely no incentive to resign her employment until much later than the time when she actually left work, even if she never really considered returning at all. Money paid to a pregnant employee on maternity leave who eventually decides not to return to work after giving birth to her child amounts to a massive form of severance pay.

The data above omit entirely all women who *say* they are not returning to work and include only those women who indicate they *will* return — of this *latter class*, more than one-third (⅓) do not return.

January 31, 1972 of 1,463 women granted maternity leave, 614 were not reemployed due to a personal choice not to return. *(42% did not come back)*

(2) For Southern Bell Telephone and Telegraph Company, for a period fron October 1, 1972 to January 31, 1973, of 860 women granted maternity leave of absence, 267, or *31% did not come back.*

For the same company, for a period from July 1, 1971 to January 31, 1972, of 1,014 women granted maternity leave of absence, 366, or *36% did not come back.*

For the Georgia area alone, of the 459 women who were granted maternity leave of absence, 147, or *32% did not come back.*

The same information provided in the Answers to the Interrogatories shows that most of the employees who *did* return to work from maternity leaves returned after an absence of from four to six months, and almost 9 percent returned more than a year later.

ARGUMENT

I. The Ruling Of The Supreme Court In *Geduldig v. Aiello* Is Binding On The Question Of Whether An Employer Must Include Normal Pregnancy Among The Covered Disabilities In A Sickness And Accident Insurance Plan.

This action was brought under Title VII of the Civil Rights Action of 1964 alleging, *inter alia,* that the prac-

tice of appellee American Telephone and Telegraph Company, Long Lines Department, in failing to include normal pregnancy among the disabilities covered in its temporary sickness and accident disability plan constituted an unlawful discrimination in employee compensation on the basis of sex. The initial question must be, therefore, whether the failure to pay benefits under a sickness and accident disability benefits plan for disability due to normal pregnancy can constitute "discrimination on the basis of sex." If, and only if, appellants can show that the practice alleged constitutes *discrimination on the basis of sex*, does it become necessary to consider whether such discrimination is justified on the basis of any Title VII defense.[2]

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2 Charges of sex discrimination may be examined under several laws of the United States. For example, the permissibility of discrimination on the basis of sex by the states is governed by the Equal Protection Clause of the 14th Amendment, while the permissibility of such discrimination on the part of the federal government is controlled by the 5th Amendment. Similarly, the extent to which private employers may discriminate on the basis of sex in hiring, compensation or wages is governed by Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. Using these various laws as weapons, women are attacking stereotyped barriers of entry into what was heretofore a male-dominated employment market.

Some forms of differentiation on the basis of sex are legally permissable, however, and under each of the laws mentioned above, certain defenses are available to a party charged with sex discrimination. Thus, a state may show that it is not in violation of the Equal Protection Clause of the 14th Amendment when it establishes a classification based on sex by showing that the classification had a "rational basis" or that its resulting discrimination is justified by a "compelling state interest." These same defenses are available to the federal government under the 5th Amendment. Likewise, under Title VII of the 1964 Civil Rights Act, an employer may justify discrimination on the basis of sex if it is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." An employer may also discriminate in pay between employees of different sexes provided that the system under which such pay differentials are calculated is one which measures earnings by quantity or quality of production.

A. IN *GEDULDIG* THE SUPREME COURT HELD THE EXCLUSION OF PREGNANCY RELATED DISABILITIES DOES NOT CONSTITUTE DISCRIMINATION ON THE BASIS OF SEX.

The Supreme Court of the United States, in its decision in the case of *Geduldig v. Aiello*, ___ U.S. ___, 41 L. Ed. 2d 256 (1974) declared that the exclusion of disability resulting from normal pregnancy from a sickness and accident disability program does not constitute discrimination on the basis of sex. In *Geduldig*, the three dissenting justices argued that since only women could become pregnant, any failure to include pregnancy in a disability plan was clearly discrimination based on sex, but the majority of the court very succinctly disposed of the false logic of that position. In the language which the lower court here quite properly found to be dispositive of the issue, the Supreme Court stated in footnote 20:

> "While it is true that only women can become pregnant, it does not follow that every legislative classification is a sex-based classification like those considered in *Reed, supra,* and *Frontiero, supra*. . . .
>
> The lack of identify between the excluded disability and gender as such under this insurance

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Though there may be several provisions governing sex discrimination under each of these laws there is a two-step analysis. The threshold question for each is the same, whether the act or practice complained of constitutes *discrimination namely, on the basis of sex*. If the answer to the threshold question is in the affirmative, then the party accused of a particular act or practice may interpose a defense of justification, the extent of justification required being governed by the particular law under which the action is brought.

> program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The physical and actuarial benefits of the programs thus accrue to members of both sexes."

In *Geduldig* the Supreme Court has put to rest the type of "boot strapping" in which appellants have attempted to indulge. The mere filing of a complaint alleging sex discrimination does not shift the burden of proof to the defendant and, without more, require that a justification of the practice be made. Logic and justice require that courts first examine the practice under attack to see if the distinctions complained of create classes based on *sex* or if there are other reasonable, fair and non-pretextual factors involved which lead to these distinctions.

B. THE PHRASE "DISCRIMINATION ON THE BASIS OF SEX" DOES NOT MEAN SOMETHING DIFFERENT UNDER TITLE VII THAN IT DOES UNDER THE FOURTEENTH AMENDMENT.

Geduldig was decided under the Equal Protection Clause. The present action is brought under Title VII. *In order to prevail here, appellants must convince this Court that the clear meaning of the English words "discrimination on the basis of sex" means something different when the Fourteenth Amendment is involved than they do when Title VII comes into play.* In this regard, the cases relied upon by the appellants to bolster their argument that Title VII "standards" are different than Equal Protection "standards" are inapposite.[3] Even if it were

true that courts have struck down some practices under Title VII while similar practices passed muster under the Equal Protection Clause, *amici's* position here is not weakened because the threshold question remains the same — whether there is "discrimination because of *sex*."

It is not here asserted that once discrimination is found that the courts must apply the same standards for determining its permissibility under both laws. It is asserted that *when the Supreme Court determines that a practice does not "discriminate on the basis of sex,"* as a statement of logic, the lower courts are bound to apply that logical equation to the *same practice* when the statutory proscription is also against "discrimination on the basis of sex," i.e., the words have the same meaning. Such an equation was set forth in *Geduldig,* which, as Judge Knapp found, "flatly states that distinctions involving pregnancy do not constitute discrimination because of sex (or gender)." 8 FEP Cases 579, 580.

While *Geduldig* did not expressly advert to Title VII, there is support for the inference that the court intended to influence Title VII interpretation. In its analysis, the dissent did not restrict itself to a discussion of the Equal Protection Clause, but also relied on Title VII, the relevant EEOC Guidelines, and the position set forth in an EEOC *amicus* brief filed in that case. Footnote 20 of the majority opinion was intended to be a direct response to the minority's reasoning and conclusion. The majority,

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3 All of the cases set forth by appellant go to an examination of the application of various legal precepts under the 14th Amendment and Title VII to types of sex based discriminations. What appellants' argument ignores is that the automatic "leap" from complaint to an examination of justification defenses is not applicable in this instance. The initial question is whether the practice complained of constitutes discrimination on the basis of sex. *Geduldig* says that it does not.

under these circumstances, could not have failed to recognize that its decision in *Geduldig* would influence the disposition of related Title VII cases, especially in light of the fact that nowhere is there found in the majority opinion any language or reservation of limitation. It appears evident to *amici* that had the Supreme Court wished to establish different definitions for the phrase "discrimination based on sex" under the Fourteenth Amendment and under Title VII, it would have prefaced its remarks accordingly or followed them with a caveat. Perhaps the majority explicitly intended to dispose of the Title VII attack on the same practice when engaged in by an employer since it rejected the dissent's argument which included Title VII matters. Nevertheless, and without regard to such possible intent, *there is no other logical application of Geduldig* to a Title VII case.

Appellants asserted below and here assert again that *Geduldig* is distinguishable on the ground that deference is to be accorded under the Fourteenth Amendment to state legislative judgments on social welfare matters, but that no such deference is warranted under Title VII to allegedly discriminatory employment practice. Perhaps the best response to this argument is found in Judge Knapp's opinion in the lower court, where he stated:

> The flaw in this argument is that it begs the question. The threshold question is whether disparity of treatment between pregnancy related disabilities and other disabilities can be classified as a discrimination because of sex (or gender). If, as footnote 20 seems to suggest, it cannot be so classified, then the further question of whether such disparity is justified — or less justifiable in the employment context than in some other context — can never be reached. In other words, if the

> *Aiello* Court had found that the California scheme did discriminate on the grounds of sex (or gender) but must nevertheless be upheld because of the deference due to California's sovereign right to make choices in methods of providing social welfare, the holding would clearly be inapplicable to a case arising under Title VII where no such deference is required. But such, as we read it, was not the holding of the court. The holding was the California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender). *Such a holding precludes relief under Title VII even more clearly than under the 14th Amendment.* Under the Amendment it would be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII, which deals only with discrimination "because of . . . sex." 42 U.S.C. § 2000e (2)(1). 8 FEP Cases at 531. (Emphasis added.)

In upholding the California plan in *Geduldig,* the Supreme Court took note of the fact that "the physical and actuarial benefits of the programs . . . accrue to members of both sexes." *Geduldig, supra,* footnote 20. The court found it important that the substantial increase in cost which would accompany inclusion of normal pregnancy among the covered disabilities would have to be born by the non-pregnant citizens of California — both male and female. *Geduldig, supra,* at 265. The appellants attempt to distinguish *Geduldig* on this basis stating that it is not the other employees — non-pregnant persons —

who would bear the higher costs of inclusions of normal pregnancy coverage in a sickness and accident insurance plan — but the employer. Thus, they say no benefit accrues to the non-pregnant employees because of the exclusion.

The invalidity of this argument is readily apparent when one realizes that any business (as a state) has a finite amount of money which is available for employee compensation and benefits (or any other purpose). Funds expended on higher premiums, which would accompany the inclusion of pregnancy benefits and which the employer allocates as a cost attributable to labor, are funds which employees might otherwise have received in the form of higher wages or other benefits through the process of labor contract negotiations. Those higher wages and benefits when bargained for, *must*, under the laws of this country inure to employees of both sexes.

Thus, inclusion of pregnancy benefits would have a secondary effect of requiring *non-pregnant persons to foot the bill* by placing substantial funds beyond their bargaining reach. The choice of whether this should be done is most properly left up to the bargaining units as the people involved.

C. RELEVANT TITLE VII AUTHORITY IS IN ACCORD WITH THE HOLDING OF *GEDULDIG*.

A number of relevant Title VII judicial precedents anticipated, and are in accord with, the conclusion in *Geduldig* that the pregnancy exclusion involved therein did not constitute discrimination on the basis of sex. Under these cases the essence of the prohibition against sex

discrimination set forth in Title VII is that *individuals similarly situated and qualified* may not be treated differently on the basis of sex. Stated differently, the employer must allow the sexes to compete, on an equal footing, wherever they reasonably can with the same rule for each sex. This principle was made clear in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), which determined that "Section 703(a) of the Civil Rights Act of 1964 [42 U.S.C. §2000(e)-2(a)] requires a person of *like qualifications* be given employment opportunities irrespective of their sex." 400 U.S. at 544 (Emphasis added). In the *Phillips* case, a company policy of not accepting job applications from women with pre-school children, but accepting applications from men with pre-school children, was found by the Fifth Circuit Court of Appeals not to violate Title VII because it was not discrimination based *solely* on sex. 411 F. 2d 1, rehearing denied, 416 F. 2d 1257. In a short *per curiam* opinion, the Supreme Court remanded on the ground that the Court of Appeals "erred in reading this section as permitting one hiring policy for women and another for men — each having pre-school children." 400 U.S. at 544. In so holding, the Court determined that the proper test for a *prima facie* violation of Title VII was whether "persons of like qualifications" were treated differently because they were of opposite sexes. In accord is *Sprogis v. United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir., 1971), *cert. den.* 404 U.S. 991 (1971) where United's rule requiring that stewardesses be unmarried was held to constitute a *prima facie* violation of Title VII where no similar rule applied to male personnel.

Thus, in *Phillips*, as in *Sprogis*, the characteristics on which the allegedly discriminatory actions were based were potentially common to both sexes. Having pre-

school children as in *Phillips*, or being married as in *Sprogis*, are conditions which can and do occur among both males and females. The uniqueness of pregnancy, as the Supreme Court recognized in *Geduldig*, makes it a different matter entirely.

The case of *Rafford v. Randle Eastern Ambulance Service*, 348 F.Supp. 316 (S.D. Fla. 1973) points out the distinction between classifications based on sex and classifications unique to one sex but within the control of its individual members and helps demonstrate the illogic of the rationale which appellants are urging this Court to adopt under the guise of a Title VII violation. In that case, male employees alleged that they were discharged for refusing to shave their beards and mustaches and that such action by their employer constituted sex discrimination in violation of Title VII. The Court in effect, said there were two classes of people — those with beards and those without beards — among the latter group were women and men:

> "Plaintiffs in effect argue that males who do not shave cannot work, while females who do not and need not shave were allowed to work. Such an argument has a *reductio ad absurdum* appeal: Since women normally cannot grow beards and mustaches, the firing of men with such features necessarily discriminates against the men because they are men and are able to grow beards, i.e., because of their sex. I cannot, however, subscribe to such an interpretation of the Act. . . . That is a case of discrimination in favor of men who shave off their beards and mustaches. It does not involve proscribed sex discrimination. (348 F. Supp. at 319)

Application of the principles of *Geduldig*, *Phillips* and *Rafford* to the instant case makes it clear that the exclu-

sion of sickness and accident benefits for normal pregnancy from an employer's disability insurance plan does not violate Title VII. As in *Geduldig*, the employer's sickness and accident insurance plan merely "divides potential recipients into two groups: pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. "The . . . benefits of the program thus accrue to members of both sexes". *Geduldig v. Aiello, supra,* 42 U.S.L.W. at 4908, footnote 20.

In sum, pregnancy is not an inevitable incident of womanhood. Female employees can avoid pregnancy and thus avoid falling within the group affected by the pregnancy exclusion just as male employees may choose to remain clean shaven. Simply put, the disability coverage in the plan before this court, "does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities."

II. An Independent Examination Of Title VII And The 1972 E.E.O.C. Guidelines On Sex Discrimination Confirms The Holding Below That *GEDULDIG* Is Dispositive Of The Issues Raised In This Appeal.

Title VII of the Civil Rights Act of 1964, as amended in 1972, proscribes discrimination against any individual in his employment, "because of [the] individual's . . . sex" except under a few narrowly limited circumstances described in the Act. 42 U.S.C. §2000e-2(a). Nowhere in the Act is there any indication of what is meant by the

phrase "discriminate on the basis of sex", nor of course, is there any specific reference to pregnancy, much less to any pregnancy exclusion in the context of disability insurance coverage. Therefore, a reference to the law's relevant legislative and interpretive history as well as an examination of the sound policy concepts which lead to its enactment helps to determine its meaning. Close scrutiny of each of these elements leads to the inescapable conclusion that Title VII does not prohibit the type of pregnancy exclusion involved in this case.

A. THE LEGISLATIVE HISTORY OF TITLE VII AND THE PROPOSED EQUAL RIGHTS AMENDMENT TO THE CONSTITUTION SUPPORTS THE VIEW THAT THE PREGNANCY EXCLUSION INVOLVED HERE IS LAWFUL.

As is known to the Court, legislative history of Title VII's prohibition against discrimination based on sex is extremely sparse. The House debate on the sex discrimination amendment covers only nine pages in the Congressional Record.[4] The problem presented in this case was not anticipated during that brief debate, although one of its proponents, Congresswoman St. George, *did state that women did not seek or need "special privileges" of the type sought here.*[5] Senator Humphrey, manager of the pending Senate bill, commented at one point that, *"differences of treatment in industrial benefit plans,* including earlier retirement options for women,

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4 110 Cong. Rec. 2577-2584 (1964). *See generally,* Note, "Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964." 1968 Duke L.J. 671.

5 110 Cong. Rec. 2581 (1964).

may continue in operation under this bill if it becomes law."[6] Certainly, these remarks strongly suggest that Congress wisely recognized that the inherent differences between men and women would justify certain distinctions which employers could make with regard to benefit plans. What Congress in effect said was that Title VII's sex discrimination provisions did not reach those particular situations where men and women were not similarly situated.

Some contemporary thinkers who attribute the position set forth above to the fact that these remarks were made "in another era" of our country's history, before Women's Liberation, the miniskirt, and widespread distribution of the Pill, may be surprised to discover that a far more recent and presumably more enlightened Congress took the same stand on the matter less than three years ago, and this time it stated its position even more clearly.[7] In 1970 and 1971, Congress considered the proposed Equal Rights Amendment to the Constitution ("ERA"). During the hearings and debates on the ERA, much was said about the concept of sex discrimination in a situation where members of the two sexes were *not similarly situated.* For example, fourteen of the members of the House Committee on the Judiciary who supported the version of the ERA which was ultimately approved by both Houses of Congress stated as their Separate Views:

> ". . . The original resolution does not require that women must be treated in all respects the same as

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6 110 Cong. Rec. 13663-4 (1964).

7 The practice of looking to analagous legislative activity to glean the general legislative understanding of any given provision was sanctioned by the Supreme Court in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973).

men. 'Equality' does not mean 'sameness'. As a result, *the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex.* For example, a law providing for payment of the medical costs of childbearing could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative." H.R. Rep. No. 92-359, 92nd. Cong., 1st Sess. 7 (1971) (Emphasis added).

This understanding was adopted by the majority Report of the Senate Committee on the Judiciary,[8] by the authors of the ERA,[9] and by various constitutional scholars and commentators.[10] Proponents of the ERA continually explained that laws concerning wet nurses, sperm banks, *childbearing,* forceable rape and other matters related to physical characteristics unique to one sex are not laws which discriminate on the basis of sex. Thus, a classification dealing with pregnancy in a separate manner, consistent with the general concepts set forth above, is not a scheme within the Congressional mind which discriminates on the basis of sex. Given the Constitutional dimensions of the ERA, it would be quite anomolous to construe Title VII as outlawing the type of pregnancy ex-

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8 S. Rep. No. 92-689, 92nd Cong., 1st Sess. 11 (1971).

9 Hearings on H. J. Res. 35,208 and Related Bills, and H.R. 916 and Related Bills, before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 92nd Cong., 1st Sess. 40 (1971).

10 *E.g.*, T. Emerson, Hearings on S.J. Res. 61, S.J. Res. 231 before Committee on Judiciary, U.S. Senate, 91st Cong., 2nd Sess. 430, n. 7 (1970).

clusion involved here where even the ERA would not treat such an exclusion as sexually discriminatory.

In all, the legislative history of the Equal Rights Amendment reflects one idea very clearly: Upon giving it much thought, all concerned agreed that a practice which deals directly with a physical characteristic that is unique to one sex does not, without more, constitute discrimination on the basis of sex.

B. *THE EEOC'S 1972 SEX DISCRIMINATION GUIDELINES CONCERNING PREGNANCY AND CHILDBIRTH ARE COMPLETELY INCONSISTENT NOT ONLY WITH CONGRESSIONAL INTENT, BUT ITS OWN LONGSTANDING PRIOR INTERPRETATIONS OF THE ACT AS WELL, AND ARE NOT ENTITLED TO ANY DEFERENCE IN THE DECISION OF THIS CASE BECAUSE THEY ARE THE PRODUCT OF NAKED ADMINISTRATIVE FIAT.*

If Congress did not consider the exclusion of disabilities caused or contributed to by childbirth from employment benefit plans to be a violation of Title VII, then who advanced the notion that such an exclusion was

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11 The fact that Title VII, like the E.R.A., allows recognition of physical characteristics unique to one sex and prohibits only unequal treatment of people similarly situated is supported by the analysis of Title VII articulated in the existing case law. Compare *Rafford vs. Randle Eastern Ambulance Service*, 348 F. Supp. 316 (S.D. Fla. 1972) with *Phillips vs. Martin Marietta Corporation*, 400 U.S. 542, 544 (1971); *Sprogis vs. United Airlines, Inc.*, 444 F. 2d 1194 (7th Cir.), cert. den., 404 U.S. 991 (1971).

not only prohibited, but even constituted a *prima facie* violation of the Act? The answer is the EEOC, and the story behind the issuance of the 1972 "Guidelines on Discrimination Because of Sex" and the new commission policy relating to pregnancy and childbirth is a shocking example of the *pure abuse of administrative power.*

Guidelines on Discrimination Because of Sex were originally issued by the EEOC on November 24, 1965;[12] they were amended first on February 21, 1968[13]; again on August 19, 1969;[14] and were last amended and revised effective April 5, 1972.[15] Prior to the last revision, the Guidelines expressed no view whatsoever with respect to the way disabilities resulting from pregnancy or childbirth were to be treated. However, in a series of opinion letters issued contemporaneously with the passage of Title VII and adhered to consistently up to 1972, the EEOC repeatedly stated its position that pregnancy coverage could be excluded. For example, in an opinion letter issued in 1966, General Counsel Charles Duncan succinctly explained the EEOC's position on the issue:

> ". . . The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most

12 30 Fed. Reg. 14926
13 33 Fed. Reg. 3344
14 34 Fed. Reg. 13367
15 37 Fed. Reg. 6835

> women employees. . . . We do not believe an employer must provide the same fringe benefits for pregnancy as he provides for illness. . . ." (Excerpt from an EEOC opinion letter dated November 15, 1966.)

On the specific question before this Court as to whether pregnancy need be covered under disability insurance benefits plans, Mr. Duncan set out the EEOC's position in another opinion letter "issued pursuant to 29 C.F.R. 1601.30":

> ". . . An insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory."
> (Excerpt from an EEOC opinion Factor, dated November 10, 1966.)[16]

General Counsel Opinion Letters are considered to be interpretations of Title VII by the Commission. *Williams v. New Orleans S.S. Association*, 341 F. Supp. 613, 615-616 (E.D. La. 1972). Absent more, since the opinion letters were reasonably contemporaneous with the Act, and they were consistent with each other, they are entitled to "great deference" by the courts. *National Labor Relations Board v. Boeing Company*, 412 U.S. 67, 75 (1973).[17]

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16 Certain of the Opinion Letters issued in 1966 regarding the instant question were published in the CCH Reporting Service. E.g., See CCH EPG ¶17,304.43.

17 EEOC's policy in this regard, as indicated by Mr. Duncan's opinion letters, is also reflected in the EEOC's reports to Congress and EEOC's decision. E.g., EEOC's First Annual Report for the Fiscal Year Ending June 30, 1966, p. 40; Commission Decision No. 70-360, CCH EEOC Decision ¶6084 (issued on December 16, 1969).

Notwithstanding its prior interpretation of the Act with regard to the pregnancy benefits question, the EEOC suddenly reversed itself and issued revised guidelines on April 5, 1972, about the time the big push for passage of the Equal Rights Amendment was beginning in statehouses across the country. These new Guidelines provided in relevant part:

> "(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. . . ."
> 29 C.F.R. §1604.10(b).[18]

These radically different "guidelines", which obviously would have a major economic impact on the business sector, were developed in a factual vacuum with no respect whatsoever for necessary procedural safeguards and with absolutely no investigation whatsoever.

In order for a court to defer to administrative interpretations, it should first satisfy itself that such interpretations have been issued relatively contemporaneously with the enactment of the law, have been consistently

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18 It is interesting to note that although the Guidelines were published in the *Federal Register* in the "Rules and Regulations" section, none of the salutary procedural requirements necessary to the promulgation of Agency regulations found in the Administrative Procedure Act (5 U.S.C. 553) were adhered to.

adhered to,[19] are reasonable in the light of legislative history, and are justified by available relevant data. *See Espinoza v. Farah Manufacturing Co.*, 462 F.2d 1331 (5th Cir. 1972), *aff'd* 414 U.S. 86 (1973). *Not one of these requisites has been met with regard to the 1972 Guidelines on Pregnancy.*

These guidelines were prepared by Mrs. Sonia Pressman Fuentes, Chief of the Legislative Counsel Division of the EEOC at the time they were published. The Office of Legislative Counsel was responsible for drafting rules, regulations and guidelines within the area of sex discrimination and other matters. In *Newmon v. Delta Air Lines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973) (a case which considered the very issue before this Court), Mrs. Fuentes was subpoenaed and testified (by deposition) concerning the issuance of the guidelines by the Commission. Mrs. Fuentes' testimony shows that the guidelines were not a product of careful consideration by the EEOC, but rather were (and are) no more than the personal view of Mrs.

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19 Not only does the 1972 Guideline represent a position which is inconsistent with the EEOC's prior position, *the EEOC has not even been consistent in its application of the 1972 Guideline on employment policies relating to pregnancy and childbirth.* This is revealed by certain facts in connection with a Federal Communications Commission rate increase proceeding involving American Telephone & Telegraph in which the EEOC participated. F.C.C. Case No. 19143. On January 18, 1973, in connection with that proceeding, the EEOC was agreeable to an Agreement providing, *inter alia*, for the entry of a consent decree in a district court wherein there was pending litigation concerning compliance by AT&T with all laws and regulations concerning equal employment opportunity. The agreement did not require AT&T to include pregnancy coverage in its disability program. This information was developed in a case similar to the instant one, *Gilbert vs. General Electric*, 7 FEP Cases 796 (U.S. D.C., E.D. Va. April 13, 1973), which is now on appeal to the 4th Circuit (No. 74-1557). Facts concerning the F.C.C. proceeding and the subsequent Agreement can be found in the record of that appeal at App. 219-20, 1033, 1037-8, 1047, 1073-1109.

Fuentes, (and the work of perhaps two or three other attorneys in her office) *and were based on no facts whatsoever.* Portions of that remarkable testimony are attached hereto as Appendix "A".

Despite the evasiveness and equivocation which characterized Mrs. Fuentes' deposition testimony, certain relevant and interesting information was elicited. Among other things, Mrs. Fuentes testified that she knew of no medical studies concerning pregnancy which had been conducted by the EEOC prior to the issuance of the guidelines.[20] She further testified that she was not aware of any financial studies concerning the impact of the guidelines on industry as a whole which had been made by the EEOC or which were available to the EEOC at the time the guidelines were drafted.[21] And, in spite of the fact that her office was unaware of relevant medical and economic data collected either by the EEOC or others, Mrs. Fuentes indicated that there were no public hearings held in connection with the development of the guidelines which might have elicited helpful information.[22]

Having heard this evidence concerning the circumstances surrounding the promulgation of the instant guidelines, the court in *Newmon* concluded that they were not worthy of judicial deference because "there appears to be no factual basis upon which these regulations were drawn."[23] Having failed to develop that "factual basis",

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20 Appendix at 3-5

21 Appendix at 3-4

22 Appendix at 5

23 374 F. Supp. at 245

and having failed to adhere to the salutary procedures which other agencies follow when issuing interpretations to which courts have accorded "great deference," the EEOC has abandoned any right to claim such "deference" in this or any other case.

The validity of that position is further supported by reference to the position taken by other Federal agencies.[24] Thus, for example, the Sex Discrimination Guidelines promulgated by the Secretary of Labor pursuant to Executive Order 11246[25] do not require that employee medical benefit plans cover pregnancy related disabilities as long as an employer makes equal contribution to such plans for employees of both sexes.[26] As another example, regulations promulgated by the Wage and Hour Administrator under the Equal Pay Act[27] provide that payments related to maternity are not wages for purposes of that statute[28] and further state that:

> "If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other."[29]

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24 *Cf. Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 88 n. 2 (1973).

25 3 C.F.R. 173

26 41 C.F.R. §60-20-3(c)

27 29 U.S.C. 206(d)

28 20 C.F.R. §800.110

29 20 C.F.R. §800.116(d)

It is submitted that the interpretative history of Title VII supports the conclusion that the exclusion of pregnancy from employment disability insurance coverage does not constitute "discrimination on the basis of sex" within the meaning of Title VII. The 1972 EEOC guideline to the contrary possesses none of the indicia of validity, deserves no deference, and is wrong.[30] Rather, the uniform position of the other federal agencies and the consistent and contemporaneous position taken by the EEOC itself prior to 1972 is the proper interpretation of the meaning of sex discrimination under Title VII as related to individualized treatment of pregnancy.

C. *REASONABLE FAIR AND NON-PRETEXTUAL DISTINCTIONS HAVE NOT HISTORICALLY BEEN CONSIDERED "DISCRIMINATION".*

A ban on discrimination on the basis of sex does not prohibit reasonably different treatment based on physical characteristics which while unique to one sex are within the control of its individual members.[31] As Chief Judge Haynesworth wrote in *Cohen v. Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1973), *rev'd on other grounds*, 414 U.S. 632 (1974):

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30 The Supreme Court has recently rejected NLRB decisions where that agency departed from its own precedents. *E.g., National Labor Relations Board vs. Bell Aerospace Co.*, — U.S. — 40 L.Ed.2d 134 (1974).

31 Amici do not mean to suggest that differential treatment based on physical characteristics unique to one sex, where such is a mere *pretest* to discriminate against a sex, is beyond the reach of the legislative proscription. *Griggs vs. Duke Power Company, supra*, 409 U.S. 424 (1971). The "pretext cases" would still be good law.

"We are not accustomed to thinking, as sex classifications, of statutes making it a crime for a man to forcefully ravish a woman, or without force, carnally to know a female child under age. Military regulations requiring all personnel to be clean shaven may be suspect on other grounds, but not because they have no application to females. Prohibition or licensing of prostitution is a patent regulation of sexual activity, the burden of which falls primarily on females, but it has not been thought invidious sex classification."

III. AT&T's Exclusion Of Pregnancy Coverage Is Justified By Legitimate And Non-Pretextual Business Consideration.

Although *Geduldig* clearly disposes of the question of whether, without more, exclusion of pregnancy coverage constitutes discrimination on the basis of sex, the majority in *Geduldig* alluded to a legitimate concern that differentiation on the basis of physical characteristics unique to one sex may be used as a pretext for discrimination against that sex. An examination of the statistical data developed in this and other reported cases, should allay the fears of any observer that there was any pretextual motivation for the pregnancy exclusion involved here. Rather, the exclusion of pregnancy coverage from employment disability benefits is justified by legitimate and reasonable business considerations.[32]

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32 Even if the pregnancy exclusion were arbitrary, which it is not, it could not be a pretext for sex discrimination unless it operates "to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program." *Geduldig v. Aiello*, 42 U.S.L.W. at 4908. Available data clearly indicates that under present employment disability programs women receive greater benefits than men on a per capita basis.

Substantial statistical data has been developed regarding the very practical implications of the inclusion of pregnancy coverage in an employment disability benefits plan.[33] Some basic and general conclusions can be drawn therefrom:

A. Under existing disability plans, even where pregnancy coverage is excluded, *women receive a disproportionately large share of the benefits.*[34]

B. As the Court recognized in *Geduldig,* coverage of normal pregnancy would obviously pose a substantial cost and *increase the disproportionate share of benefits to women.*

C. In response to the substantial cost of pregnancy coverage, employers would be forced to defer disability plans until they are able to finance the entire plan, reduce benefits for all disabilities covered to less desirable levels, exclude other disabilities which may be more deserving of coverage, or in some other manner absorb the cost by altering a balanced employee wage and benefits plan.

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33 The statistics developed by AT&T were presented to the *Geduldig* court and given substantial consideration.

34 By referring to this fact, *Amicus* is not attempting to revive the "sex-plus" test discredited by the Supreme Court in *Phillips vs. Martin-Marietta. Phillips* is inapposite because here men and women are not "similarly situated."

D. Those out of work because of pregnancy fail to return to work substantially more often than those who are absent from work because of covered sickness and accident disabilities.[35] As a *result, pregnancy coverage would, for many, constitute a massive severance pay.*

E. Besides its obvious uniqueness, pregnancy is different from other conditions causing absences from work: No other condition approaches it in terms of voluntariness; there is a far greater ability to plan for the impact of the period of disability caused by pregnancy; pregnancy coverage would be subject to greater abuse since the permissible duration of pregnancy absences is difficult to objectively determine.

These are only some of the legitimate business considerations which employers (and unions) have relied upon in their determination that the payment of pregnancy benefits would not be a rational and prudent use of benefit money. They have all been discussed and substantiated in detail by the parties and it is unnecessary for *Amici* to further rake this ground. Suffice it to say, the exclusion of pregnancy coverage is a product of legitimate business concerns and is not an impartial rule working to disguise improper motives and achieve illegal ends.

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35 *See generally*, discussion of facts at pp. 5-7, *supra*.

CONCLUSION

The argument that "only women can become pregnant; therefore, a rule concerning pregnancy discriminates against women", is appealing in its simplicity, but it omits entirely the fact that a great many women are included in the class of non-pregnant persons who are also affected by the rule. It is submitted that mature judgment will reject this simplistic solution to a complicated problem and comprehend the rights of non-pregnant women as well. A conclusion that reasonable, fair, and non-pretextual distinctions which take into account mutable differences between the sexes is allowed would better serve all people. It is submitted that the courts should not formulate a *rule of law* that under Title VII reasonable differentiation on the basis of pregnancy constitutes unlawful discrimination on the basis of sex.

The Supreme Court's decision in *Geduldig* reached such a judgment that exclusion of pregnancy from a disability benefit plan does not constitute "discrimination on the basis of sex." That decision disposes of a Title VII attack on the same practice. This conclusion is supported by the legislative and interpretative history of Title VII and is consistent with a construction of Title VII which is necessary to a sound public policy in this area. It is not the national policy of the United States to reward women for having children. It is ridiculous to assert that a woman who decides to bear a child is "penalized" or "damaged"

because the class of non-pregnant employees is not required to pay for the decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing has been served on counsel of record by depositing same in the United States mail, postage prepaid, properly addressed this 15th day of November, 1974.

Robert N. Meals Jr.

APPENDIX A

Proceedings Taken at the Offices
of the Equal Employment Opportunity Commission
Washington, D.C. 20506

Testimony of Sonia Pressman Fuentes (called as a witness by Delta Air Lines in the Matter of *Newmon v. Delta Air Lines,* Civil No. 15681, Northern District of Georgia, on May 31, 1973, to give a deposition concerning the drafting and promulgation of the "EEOC Guidelines on Discrimination Because of Sex", issued March 31, 1972.)

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Whereupon

SONIA PRESSMAN FUENTES

was called for examination by counsel for the defendant, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MURPHY:

Q Please state your name for the record. A My name is Sonia Pressman Fuentes.

* * * *

Q By whom are you presently employed? A By the Equal Employment Opportunity Commission.

* * * *

Q What was your job with the Equal Employment Opportunity Commission? That is, commencing in 1965? A I was a member of the General Counsel's Office.

* * * *

[12] Q Approximately when did you become Chief of the Legislative Counsel Division? A I gave you my best recollection. It was during the time Stanley Hebert was counsel, several years ago. I am sorry. I am not that good on time. Maybe two or three years ago.

Q Did you continue in that position as Chief, Legislative Counsel up until this day, or have your responsibilities changed in the interim? A No. I think commencing the first February of this year, that Division was abolished and I became an attorney in the trial litigation section.

Q Now, do you recall meeting with me here at your office on or about May 4, 1973? A I don't remember the date, but I did meet you.

Q And at that time can you recall me asking you several questions concerning the development of the Equal Employment Opportunity Commission Guidelines which [14] are contained in Section 1604.10, I guess it is of the Commission's Regulations and Guidelines . . . In fact, is this a copy of the Guidelines on Discrimination Because of Sex of the Equal Employment Opportunity Commission? A It appears to be. It is. I don't know whether it is complete or not. They are published in the Code of Federal Regulations. I don't know whether this is complete. These are certainly some of the documents.

Q I refer you specifically to the last page on the docu-

ment and I refer you to specifically Section 1604.10 and I ask you if those are the . . . Guidelines with regard to Pregnancy and Childbirth which we discussed during my visit on May 4, 1973? A Well, they are the Guidelines on Pregnancy and Childbirth. They are so entitled.

Q At the time of my discussion with you in early May, can you recall me asking you if you participated in the development of these Guidelines with other attorneys [15] here of the Equal Employment Opportunity Commission? A I recall that I said I was one of many Commission personnel who had participated in the formulation of the Guidelines.

Q Can you recall me asking you at that time whether you knew of any medical studies which had been made in conjunction with the development of those Guidelines? A As I recall, *I think you asked me whether the EEOC had conducted any medical studies and I think I recall saying to my knowledge it had not.* I think I also recall stating that there had been medical testimony, considerable medical testimony presented in Court cases which involved allegations of discrimination in connection with Employer policies in the pregnancy area and I cited such court cases to you. I am trying to think of the name of it now. There was one case where there was considerable medical testimony pointing out that a woman can safely work when she is pregnant, and so on. *To my knowledge, EEOC had not itself made such studies.*

[17] Q Can you recall me asking you at our conversation in early May whether or not the EEOC to your knowledge had conducted any studies with regard to the financial impact of the pregnancy and maternity leave guidelines? A Well, [18] if there was such a study, since it was not made public, whether or not it was made would

be a matter available to the general public; therefore I could not testify about it.

[19] Q To refresh your memory, can you recall us discussing in early May a study about the financial impact of the Commission's Guidelines which had been made by a Bank [20] in the Boston area? A I am trying to think. I think I have seen some write-up but I don't recollect where, in a publication put out by Prentice-Hall. Prentice-Hall put out a study on leave policies in connection with maternity leave policies. *It might have contained some information on the cost.* There might also have been some information on that in a speech Jacqueline Gutwillig gave. She gave a speech in this area which has just been published. That might have contained some facts on cost. *I am just not sure.*

[21] Q Are you aware of any studies which any one might have made with regard to the job performance of pregnant women which based upon studies of work output in relation to other women in the work foce? A *The only information I have seen, or testimony or position, are in court cases.* As I recall, the testimony indicated that by and large pregnant women could perform as well as anyone else except in jobs requiring standing where the woman involved had difficulty with swelling of the feet or ankles.

[22] Q Do you recall or do you know of any studies which have been made by anyone with regard to the psychiatric disorders which occur in pregnancy, including phobias, depression, psychoses, and emotional instability of pregnant women as it affects their job performance? A *This is the first time in my life that I have heard there are such things associated with pregnancy* . . .

Q Can you recall having seen any studies having to do with the percentage of the female population who enter labor prematurely? A No.

Q Do you recall or are you aware of any studies which have concerned the phenomenon of a histal hernia occurring in pregnant women? A That is *the first time I have heard* that is related to pregnancy, if it is.

Q Have you ever seen or are you aware of any studies concerning urological problems of pregnancy as related to working women and the impact of frequent urination on job performance? A I have seen no such study.

Q Have you seen or are you aware of any studies with regard to the physical phenomenon of pregnancy, phenomena of pregnancy as they are related to job performance? A That is a difficult question. With regard to studies, *I don't think so.*

Q Are you aware of any hearings which were held, public hearings which were held in connection with the development of the Equal Employment Opportunity Commission's Guidelines on Employment Policies relating to pregnancy in childbirth? A *No.*

[24] Q Now, is it not true that the Equal Employment Opportunity Commission's position with regard to pregnancy and childbirth has changed since the effective date of the Civil Rights Act of 1964, which was July 2, 1965? A Prior to the publication of these Guidelines on April 5, 1972, the Commission had no Guidelines on the matter of pregnancy and childbirth. There had been several Commission decisions in that area and the General Counsel's office had written some letters on that subject, but there had been no commission's position expressed in Guideline form until April 5, 1972.

[28] Q Basically, do you recall my calling you up and telling you that I had a number of clients who were in-

terested in the Commission's guidelines on discrimination because of sex, and that you said that there was another [29] woman, or man, I can't remember, another person who was primarily responsible in that area; at the present time, due to a change in positions, that you had with the Commission several months before. A I recall, I don't recall you saying that you had a number of clients who were interested. I got the impression from our conversation, of course it was a month ago, that you said you had some clients that were interested. There was a question in this area, that you wanted to come up with them, that somebody had given you my name. I can't recall exactly what I said. I think I would have said, *in the past my jurisdiction included the formulation of guidelines on behalf of the Commission,* but that was no longer within my jurisdiction and I believe I referred you to Issie Jenkins, a woman who was in charge of the office of legal counsel, who had that area within her jurisdiction. I think I might have mentioned she was out on leave in connection with the forthcoming birth of a child, and a man named John Goins was acting in her place . . .

* * * *

[46] CROSS-EXAMINATION

BY MRS. RINDSKOPF:

Q Do you know of any published studies indicating the incidence of premature birth in pregnant women? A *Do I know of any? What do you mean, "Do I know of any?" Do you mean, have I heard there have been any?*

Q Have you read or been informed of the results of

any? A To the best of my recollection, *I have not read any such studies.*

Q I think I am correct if I stated that you were not aware of the problem of hiatal hernia in pregnancy? A That is correct.

* * * *

Q While you were functioning as Chief of the Office of Legislative Counsel . . . You enumerated a number of areas for which you had responsibility. One of the areas you stated was the drafting of rules, regulations and guidelines. Now, the guidelines to which you refer are those that are published from time to time in the Code of Federal Regulations, is that correct? A They were published in the Federal Register. I think some of them find their way into the Code of Regulations.

Q Will you describe the rules to which you referred: How do they differ from the guidelines? A *I don't know that they do . . .*

Q Was the first Guidelines, Sex Discrimination as it related to Pregnancy Leaves, issued on April 5, 1972? A That is correct.

Q Prior to that time there have been no Guidelines on that subject? A No guideline rule or regulation, that is correct, although there have been Commission Guidelines on Sex Discrimination and on other subjects, published since 1965 or 1966 . . .

[59] Q Has anything ever been published in the Federal Register that has not had the prior approval of both the General Counsel and the Commission? A I don't know.